Nichols Aluminum, LLC *and* Teamsters Local Union No. 371. Case 25–CA–082690

August 18, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On April 8, 2013, Administrative Law Judge Michael A. Rosas issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Bruce Bandy because he engaged in concerted activity in support of Teamsters Local Union No. 371 (the Union).[2] The judge dismissed the complaint, finding that the evidence failed to establish that the Respondent harbored antiunion animus and finding, further, that the Respondent had lawfully discharged Bandy under its antiharassment policy. For the reasons set forth below, we disagree as to both findings and conclude that Bandy's discharge violates the Act as alleged.

Facts

A. Bandy's Participation in the 2012 Strike

The Respondent, which operates aluminum casting and finishing plants, has had a bargaining relationship with the Union since at least 1978. After the parties' collective-bargaining agreement expired in November 2011 and during bargaining over a successor agreement, employees began a union-initiated strike on January 20, 2012.[3] Bandy, a longtime union member who had been employed by the Respondent since 1978, most recently as a blender operator, participated in the strike. During the strike, the Respondent hired replacement employees. When the strike ended on April 6, the Respondent retained approximately 100 replacement employees and told the strikers who had not been replaced to report for work.

When Bandy and other strikers returned to the plant, the Respondent's managers told them they could not work unless they promised not to strike again. The managers presented Bandy and the other strikers with a form containing a pledge that they would not strike again over the issues that caused the strike. The form, captioned "Returning Strikers," included spaces for the striker to fill in his name and the date and time. Below that were two questions, "Are you here to work at Nichols?" and "Do you promise that you will not go out on strike again over the same dispute that caused the strike that just ended?" Spaces were provided for a written yes or no answer. The form then stated:

> You are now on notice that if you break that promise and go on strike again over the same dispute you will be subject to discipline up to and including the possibility of discharge.

The form did not define the scope of "the same dispute." It concluded with spaces for two witnesses' signatures. A number of returning strikers signed the form before the Union intervened and objected; thereafter, the Respondent read the form to other returning strikers. It is undisputed that Bandy agreed to the pledge not to strike again over the same dispute and the Respondent's managers were aware of this.[4]

B. Bandy's Discharge

On April 27, approximately 2 weeks after Bandy's return, the Respondent discharged him under its zero-tolerance (or "No Tolerance") policy concerning threats and harassment. Two days earlier, on April 25, employee Keith Braafhart, who had not participated in the strike, was driving a forklift near the melding area. Bandy exit-

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge mistakenly stated that the General Counsel alleged that Bandy was discharged because he supported the Union in the strike "the following year." Because it is clear and undisputed that the strike preceded, rather than followed, Bandy's discharge, the judge's error is not material.

[3] All dates refer to 2012, unless otherwise stated.

In his decision, the judge refers to the events surrounding the January 20, 2012 strike as an "Organizing Campaign." As stated above, the Union has been the representative of the Respondent's employees since at least 1978, and the record does not show that any organizing activities occurred during the timeframe relevant to this case.

[4] Given the lack of any dispute that Bandy agreed to the pledge, we find immaterial the judge's apparent error in stating that Bandy had "signed" the pledge.

ed the melding back room and walked to the right of Braafhart, who slowed the forklift and honked its horn a few times. In response, Bandy looked at Braafhart and brought his hand across his neck with his thumb pointing up in what Braafhart construed as a "cut throat" gesture. Braafhart reported Bandy's gesture and his interpretation of it as a threat to Human Resources Vice President Mike Albee and later met with Albee, Plant Manager Bill Hebert, and Blending Supervisor Vick Hansen. Just prior to reporting the interaction to management, Braafhart asked replacement worker Sam Harroun if he had witnessed the exchange. Harroun replied that he had and that he thought that Bandy was signaling Braafhart to stop blaring the forklift's horn. Harroun similarly told management that Bandy's gesture resembled a request to shut or cut off something.[5] When questioned about the incident, Bandy denied that he made any gesture, stating that he was merely scratching his throat. The Respondent suspended Bandy that day and discharged him 2 days' later.

C. The Respondent's Zero-Tolerance Policy

The parties' expired collective-bargaining agreement contains a provision that certain offenses committed by employees, "Group 1" offenses, could result in termination without a prior warning. Group 1 offenses include: "6. Assault on any employees. Violation of the Company's policy on Workplace Violence and Threats." The Respondent's longstanding "Violence in the Workplace" policy, in turn, prohibits possession of a firearm on the Respondent's property, causing physical injury to another person, "[m]aking threatening remarks . . . that constitute a threat against another individual," and "[a]ggressive or hostile behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress."

During poststrike meetings with employees, the Respondent emphasized certain policies, including its "Violence in the Workplace" policy. It displayed a PowerPoint slide stating:

> Harassing, disruptive, threatening, and/or violent situations or behavior by anyone, regardless of status, will not be tolerated and subject to discharge for the first offense.

The Respondent also posted the above statement on its bulletin boards.

On May 4, following the strike and a week after Bandy's discharge, employee Robert Schalk, a returning striker, was waiting at the timeclock when he was approached by Craig Saltzburger, a striker replacement.[6] Saltzburger shouted at Schalk, "What the fuck are you looking at? You got a fucking problem?" while making an obscene gesture. Continuing to shout, Saltzburger followed Schalk outside and attempted to block him from entering his car. Schalk returned to the facility and Saltzburger followed him, shouting, "You got a fucking problem? What are you looking at?" Schalk found Supervisor Phil McBroom and reported the problem. In response, McBroom told Schalk that he "should fucking grow up" and that if Schalk wanted him to do something, he would fire both employees.

Schalk reported the incident with Saltzburger and McBroom's response to Human Relations Manager Kristy Riley and Hebert. Although the Respondent asserts that it informed Saltzburger that his behavior was unacceptable, the record contains no documentary evidence of discipline.

The record includes evidence of four other incidents involving violations of the zero-tolerance policy.

- Sometime during the summer, employee Roosevelt Smith, who did not participate in the strike, told his supervisor that he had weapons in his car and was going to shoot him in the gut and cause the supervisor to "shit in a bag for the rest of his life." The Respondent suspended Smith, sent security to the supervisor's house, and discharged Smith 2 weeks' later.
- On October 12, during a disagreement over a work issue, striker replacement Harroun told striker replacement John Dinkman, "I'm going to take you out back and beat your ass." Supervisor Everett Orey then interjected, "Hey, that's enough," but the Respondent took no other disciplinary action.
- Shortly before the strike, on January 13, the Respondent discharged employee Mike McGlothen after a fellow employee reported witnessing him cleaning and loading a pistol in one of the Re-

[5] The Respondent excepts to the judge's finding that Harroun informed management that he did not construe Bandy's gesture as a threat, citing a document that Harroun signed shortly before the hearing in this case that does not include that fact. But the judge's finding accurately reflects Harroun's credited testimony. When asked if he ever explained his opinion of Bandy's gesture to management, Harroun stated:

> Well, we do that all the time. I mean, that's a hand gesture like when you want something shut off or cut off, or whatever. I mean, that's just a gesture we've always used. In my opinion, I told them that day that that's what I felt—you know, that he blared the horn, that's like enough, it's done, it's over, you know. I told Kris Riley the same thing, that I didn't think . . . it wasn't any threat at all. I still don't believe it was.

[6] The parties spell employee Saltzburger's name in various ways, and the record does not make clear which spelling is correct. For the purposes of this decision, we will use the same spelling that the judge uses in his decision.

spondent's offices, which caused the employee to feel uncomfortable. A month later, the Respondent rehired McGlothen as a striker replacement.

- One to two years before the strike, the Respondent discharged employee Ed Fountain for threatening to go to Human Resources Manager Riley's office and beat her with a baseball bat.

Analysis

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. To determine whether an adverse employment action was effected for prohibited reasons, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, to establish unlawful discrimination on the basis of union activity, the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Amglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 7 (2014).[7] Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence.[8] If the General Counsel makes his initial showing, the burden shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity. Id.

With respect to the General Counsel's initial showing, it is undisputed that Bandy engaged in protected activity by participating in the January–April strike and that the Respondent was aware of that activity. At issue is whether the General Counsel demonstrated that the Respondent harbored antiunion animus, thus meeting his initial burden.

The judge found that the General Counsel failed to sustain this burden, citing the absence of allegations of independent 8(a)(1) violations and a lack of evidence of statements or conduct by the Respondent that would indicate hostility toward the strike or its participants. Contrary to the judge, however, we find that the record includes both direct evidence of animus and a sound basis for inferring it.

The Respondent's treatment of the returning strikers provides compelling evidence of animus toward the strike and the employees who engaged in it. As set forth above, shortly after the strike ended, the Respondent required the returning strikers, as a condition of returning to work, to promise not to go back on strike over the same dispute. The Respondent further put the strikers on notice that breaking the promise could subject them to discipline or discharge.

The Respondent argues that the pledge merely sought assurance that employees would not engage in an illegal intermittent strike by striking again over the exact same issue. However, the Respondent elicited no testimony supporting this assertion, and there is no evidence that it offered that explanation to employees when it required that they make the pledge. Moreover, we note that the strike occurred in the context of contract negotiations and appears to have been a lawful economic strike.[9] Because the pledge did not define "the same dispute," employees could reasonably interpret the promise to encompass all issues related to the ongoing bargaining. Thus, the pledge conditioned the strikers' return to work on their promise to refrain from lawful protected activity. We find that this pledge constitutes strong evidence of animus toward the protected conduct of striking.[10]

[7] Our dissenting colleague would find that the General Counsel failed to satisfy *Wright Line's* "ultimate inquiry," i.e., "whether there is a nexus between an employee's protected activity and the adverse employer action in dispute." Our colleague explained in *St. Bernard Hospital & Health Care Center*, 360 NLRB No. 12, slip op. at 1 fn. 2 (2013) (H. Johnson, concurring opinion), that although he would not establish a showing of nexus as a fourth element of the General Counsel's initial burden, he would nonetheless find that such a showing is implicitly required under *Wright Line*. To the contrary, the Board has repeatedly stated that there is no nexus requirement as part of the *Wright Line* test. See, e.g., *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014) ("proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action" (emphasis in original)); *Encino Hospital Medical Center*, 360 NLRB No. 52, slip op. at 2 fn. 6 (2014); *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB No. 59, slip op. at 2 fn. 5 (2011).

[8] *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding*, 330 NLRB 464, 464 (2000).

[9] The Respondent established a preferential hiring list for recalling the striking employees, thus properly treating them as economic strikers. See, e.g., *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 542 (2003). There is no evidence that the employees had engaged in an intermittent strike or intended to do so in the future.

[10] The Board has long held that conditioning employment on promises to refrain from union membership or protected activity is unlawful. See, e.g., *Pratt Towers, Inc.*, 338 NLRB 61, 64 (2002); *Penn Tank Lines*, 336 NLRB 1066, 1068 (2001); *Eddyleon Chocolate Co*., 301 NLRB 887, 887 (1991). Because the complaint does not allege that the pledge constituted a separate violation, we do not find one here. However, Chairman Pearce and Member Hirozawa note that had such a violation been alleged, they would find the pledge unlawful.

In addition, the timing of Bandy's discharge, less than a month after the strike ended, supports an inference that the strike motivated the Respondent to discharge him, even though Bandy played no particularly prominent role in it.[11] Moreover, as discussed below, the record shows that the discharge was not consistent with the Respondent's previous application of its disciplinary policy, but instead demonstrated disparate treatment of Bandy's conduct. Based on the above-direct and circumstantial evidence, we find that the Respondent's animus toward the recently ended strike motivated the Respondent to discharge Bandy.

Having found sufficient evidence of animus to support the General Counsel's initial burden, we turn to whether the Respondent has established that it would have discharged Bandy under its zero-tolerance policy even in the absence of the protected conduct. Contrary to the judge, we find that the Respondent failed to make that showing.

It is undisputed that the Respondent has maintained some form of zero-tolerance policy towards workplace violence and harassment since well before the strike. When the strikers returned to work, the Respondent presented them with a detailed statement of the policy. The Respondent maintains that Bandy's discharge is consistent with its practice under the zero-tolerance policy.

The Respondent, however, has not demonstrated that Bandy's termination was in keeping with its enforcement of the policy before or since the strike, and we reject the judge's conjecture to the contrary. The judge himself found that the Respondent's enforcement of its policy presents a "mixed bag" of responses to employee misconduct, ranging from no discipline at all to immediate discharge. The judge then posited that the Respondent discharges employees who "threaten or harass others with serious physical injury or worse, while threats of physical injury and harassment tend to be overlooked." Relying on this speculative theory, the judge concluded that the Respondent "reasonably construed" Bandy's gesture as falling into the former category of threats of serious injury, thus justifying his discharge.

We do not agree that the Respondent's disciplinary history reflects the pattern that the judge discerned. The Respondent permanently discharged two employees—Fountain and Smith—for threatening to physically harm supervisors. Specifically, the Respondent discharged Fountain because he told a manager that he was going to go to her office and beat her with a baseball bat, and it discharged Smith for threatening to shoot a supervisor in the gut with a weapon that he kept in his car. The Respondent discharged McGlothen after another employee reported that he was cleaning and loading a pistol in the workplace but rehired McGlothen a month later as a strike replacement in spite of this offense.

The Respondent declined to discipline two employees—Harroun and Saltzburger—for threatening and aggressive behavior towards other employees. Notably, Harroun, a striker replacement worker, threatened to take a fellow employee "out back and beat [his] ass" but received no discipline at all. Only a week after Bandy's discharge, Saltzburger made obscene gestures and repeatedly shouted profanities at employee Schalk, trailing Schalk out of the building, blocking access to his car in a menacing fashion, and following him back into the facility to continue cursing at him in a loud voice and at close range. In both instances, the Respondent's supervisors did little more than instruct the individuals involved in the conflict to stop. Furthermore, when Schalk reported Saltzburger's misconduct, Supervisor McBroom responded dismissively, telling Schalk to "grow up" and threatening to discharge both employees.

This evidence demonstrates that the Respondent did not consistently discharge employees, even for relatively severe misconduct like Harroun's threat of physical harm and Saltzburger's harassment of Schalk immediately following the end of the strike, i.e., exactly when the Respondent was emphasizing its antiharassment policy. Moreover, the Respondent initially determined that McGlothen's cleaning and loading of a gun at work was sufficiently severe to warrant discharge, but it later apparently deemed his conduct not so egregious as to preclude reemployment during the strike. Under the circumstances, we are unable to find that the Respondent has administered its zero-tolerance policy in a consistent manner and that Bandy's discharge conformed to an established disciplinary practice.

Furthermore, even under the Respondent's zero-tolerance policy, we are not persuaded that Bandy's gesture would warrant immediate discharge. Although we adopt the judge's finding that Bandy made the "cut-throat" gesture towards Braafhart, who was sitting in a forklift approximately 10 feet away, there is no evidence that Bandy made any threatening comments or other ges-

[11] Particularized animus towards Bandy's protected activity need not be shown. See *Encino Hospital Medical Center*, 360 NLRB No. 52, slip op. at 2 fn. 6, citing *Igramo Enterprise*, 351 NLRB 1337, 1339 (2007) (unnecessary for the General Counsel to show particular animus toward discharged employee where employer manifested animus towards a group including that employee), petition for review denied 310 Fed. Appx. 452 (2d Cir. 2009). Our dissenting colleague suggests that, absent such particularized animus toward Bandy's protected activity, the General Counsel must show animus toward the *type of* protected activity that Bandy engaged in—i.e., striking. Even assuming that were required, we find that the pledge that the Respondent demanded from returning strikers demonstrated such animus.

tures. Further, the judge credited Harroun's testimony that Bandy's gesture was commonly used at the facility to indicate to a driver that an engine should be shut off. Moreover, the Respondent's actions towards Bandy following the incident belie its contention that Bandy posed an imminent threat of violence toward Braafhart: the Respondent permitted Bandy not only to leave the premises unescorted but also to reenter the facility, again unattended, to retrieve his possessions.[12] Finally, even assuming that Bandy's gesture was intended as a threat, it was similar to, or even less severe than, the threats of bodily harm and menacing harassment that resulted in no disciplinary action or, at most, an undocumented oral warning.[13]

In sum, we find, contrary to the judge, that the Respondent violated Section 8(a)(3) and (1) by discharging Bandy based on his participation in the employees' lawful strike. As explained, the Respondent demonstrated animus by the timing of the discharge and by conditioning strikers' return on their promise not to strike again. Further, in view of its inconsistent application of the zero-tolerance policy, the Respondent failed to demonstrate that it would have discharged Bandy even in the absence of the protected activity.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Bruce Bandy on April 27, 2012.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully discharged Bruce Bandy, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of his discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, we shall order the Respondent to compensate Bruce Bandy for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Tortillas Don Chavas,* 361 NLRB No. 10 (2014). Finally, we shall order the Respondent to post a notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Nichols Aluminum, LLC, Davenport, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Bruce Bandy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Bruce Bandy whole for any loss of earnings and other benefits suffered as a result of the discrimina-

[12] By contrast, in response to employee Smith's threat to shoot his supervisor, the Respondent immediately suspended Smith, removed him from the facility, and sent security to the supervisor's house.

[13] Our dissenting colleague contends that we substitute our judgment for that of the Respondent with regard to Bandy's discharge. On the contrary, we merely apply the well established burden-shifting analysis of *Wright Line*. Because we have found that the General Counsel has met his initial *Wright Line* burden, the Respondent is charged with showing that it would have administered its zero-tolerance policy in the same manner had Bandy not engaged in protected conduct. Thus, our inquiry is not whether the Board would have disciplined Bandy differently, but rather whether the decision to discharge Bandy conformed to the Respondent's own administration of its policy. As set forth above, we find that it did not.

Our dissenting colleague further states that we have "effectively revers[ed] the judge's credibility determination that the employer reasonably understood the gesture as threatening, in favor of relying on inherently contradictory testimony from two other witnesses." We disagree. The judge credited both Braafhart's and Harroun's testimony as to their perception of the incident. The judge then discredited Bandy's testimony that he made no gesture at all and was merely scratching his throat. We find no basis for disturbing those credibility determinations, and we do not reverse them. Rather, we reverse the judge's *legal* conclusion (which, despite the judge's phrasing, is not based on credibility) that the Respondent *reasonably* construed Bandy's gesture as an imminent threat.

tion against him, in the manner set forth in the remedy section of this decision.

(c) Compensate Bruce Bandy for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Bruce Bandy in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility at JM Morris Boulevard, Davenport, Iowa, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 27, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 18, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting.

> Where the employer has proper cause for discharging an employee, the Board may not rely on scant evidence and repeated inferences to make a finding that places the Board in the position of substituting its own ideas of business management for those of the employer.
>
> *NLRB v. Blue Bell, Inc.*, 219 F.2d 796, 798 (5th Cir. 1955).

My colleagues here do exactly what the Fifth Circuit years ago said the Board may not do. They rely on scant evidence and inference to put themselves in position to substitute their judgment for the Respondent's as to what alleged discriminatee Bruce Bandy did and whether it warranted discharge. Abjuring this approach and properly applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I agree with the judge that the General Counsel failed to meet his initial *Wright Line* burden of proving that animus against protected strike activity motivated the discharge. Accordingly, I respectfully dissent from the majority's reversal of the judge to find a violation.

It is undisputed that Bandy engaged in protected strike activity during contract negotiations and that the Respondent was aware of that fact. He was not alone. Almost all of the Respondent's 165 employees participated in the strike. There is no evidence that Bandy played any leadership or significant role in the strike or had any run-in with the Respondent during the strike that might support an inference that animus against his particular strike activity caused the Respondent to single him out for reprisal. His activity during the walkout is indistinguishable from that of the numerous other employees who struck.

In addition, there are no allegations of independent 8(a)(1) violations in this case, nor is there evidence of any statements or any conduct by the Respondent demon-strating general hostility towards the strikers. Contrary to my colleagues, I would not find that the Respondent's poststrike requirement of a no-strike pledge

fills the animus void. It is undisputed that, when the strike ended, the Respondent asked returning strikers to pledge that they would not strike again over the same dispute that caused the strike that just ended. Bandy was among many returning strikers who agreed to this pledge. The complaint contained no allegation that this conduct was unlawful, the judge did not find the pledge to be unlawful, and the General Counsel does not claim that the judge should have made this finding. Although such no-strike pledges may be unlawful in certain circumstances, they are not unlawful per se. *Boehringer Ingelheim Vetmedica, Inc.*, 350 NLRB 678, 679 (2007). [1]

In any event, whether requiring this no-strike pledge might have been unlawful is beside the point. There is no apparent connection between the no-strike pledge and Bandy's discharge. Bandy was not discharged for refusing to agree to the pledge. He *agreed* to the pledge, as did many other returning strikers. Nor was he disciplined for violating the pledge. Even if the pledge is considered evidence of some general animus on the Respondent's part, that itself would not satisfy the General Counsel's initial *Wright Line* burden on the Bandy discharge allegation. As I have previously observed, *Wright Line* is inherently a causation test and "[t]he ultimate inquiry" is whether there is a nexus between an employee's protected activity and the adverse employer action in dispute. *St. Bernard Hospital & Health Care Center*, 360 NLRB No. 12, slip op. at 1 fn. 2 (2013) (H. Johnson, concurring) (quoting *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–1328 (D.C. Cir. 2012)). There is no evidence here of any nexus between Bandy's strike participation and the motivation for his discharge.[2]

My colleagues' reliance on the timing of Bandy's discharge only 2 weeks after the strike ended as additional support for inferring discriminatory motive is likewise misplaced. Nothing about the timing of his discharge is suspicious. It was dictated by Bandy's own action. In meetings after the strike ended, the Respondent reminded all employees, strike replacements and returning strikers, of its existing "Violence in the Workplace" policy that did not tolerate "threatening and/or violent . . . behavior by anyone" and that provided for the possibility of immediate termination for such misconduct. Two weeks later, according to credited testimony, Bandy slowly dragged his clinched fist across his neck with his thumb pointing up in a "cut throat" gesture directed at Keith Braafhart, an employee who did not join the strike. The judge found that gesture was reasonably construed by management as "threatening," based on Braafhart's perception and description of the incident. The Respondent suspended Bandy the day he made the gesture and discharged him 2 days' later. Thus, the timing of Bandy's discharge is not suspicious. It simply reflects the Respondent's legitimate and prompt response at the time Bandy made the threatening gesture to Braafhart.[3]

[1] My colleagues decide that had it been alleged "they would find" the no-strike pledge unlawful, implicitly likening it to a "yellow-dog" contract that requires complete abandonment of the union or any union activities and which has been prohibited "[e]ven before the passage of the Wagner Act." *Eddyleon Chocolate Co*., 301 NLRB 887, 887 (1991) (requiring that an employee broadly pledge that employee "will not join a union or be affiliated with unions in any way" unlawful). The promise not to strike "over the same dispute" here does not amount to a yellow-dog contract. The promise in context seems logically limited to ensuring a mutual understanding that the strike was, in fact, over, and also giving assurance against intermittent work stoppages in support of the extant bargaining dispute, a means of protest that is not protected by the Act. This is an eminently sensible precaution for an employer in this situation, not evidence of animus. My colleagues state that the Respondent failed to present evidence in support of this interpretation showing that its officials explained the pledge's limitations to the former strikers. Why, one wonders, would the Respondent feel compelled to produce such evidence when it was not on notice that the unlawfully coercive nature of the pledge was at issue?

[2] Thus, in my view, my colleagues and the precedent they cite mischaracterize the General Counsel's initial *Wright Line* burden to prove that animus against union or other protected concerted activity motivated an adverse action. The General Counsel may of course meet this burden by proving particularized animus against the employee. The General Counsel may also prove general animus sufficient to warrant the inference that it was a motivational factor against the type of protected activity in which the employee was known or suspected to have engaged. In this case, the General Counsel has failed to meet his burden by either showing.

[3] My colleagues suggest that the innocent, or at least more ambiguous, nature of Bandy's conduct is shown by the credited testimony of coworker witness Sam Harroun that Bandy's hand gesture resembled a signal commonly used to tell someone to stop or cut off an engine. Harroun opined that Bandy may have been signaling for Braatfarth to stop blowing the horn on the forklift truck he was driving. However, the majority glosses over the fact that Bandy *expressly denied* that he made *any* hand gesture in order to signal Braafhart to stop blowing the horn. Harroun testified that, after Braafhart asked if Harroun saw Bandy making a threatening gesture, Bandy "come walking by kind of chuckling, said he had—his throat itched." In Bandy's own discredited testimony, contradicted by Harroun, he testified that he was "jumping back" from the forklift and may have involuntarily made a hand motion. Importantly, weighing the testimony of all the witnesses, the judge specifically credited Braafhart that he understood Bandy's gesture as threatening. Contrary to my colleagues and consistent with the judge's analysis, I find Harroun's testimony that Bandy did make some cutting gesture with his hand partially corroborates Braafthart's testimony and contradicts Bandy's. My colleagues err by effectively reversing the judge's credibility determination that the employer reasonably understood the gesture as threatening, in favor of relying on inherently contradictory testimony from two other witnesses. My colleagues deny reversing the credibility determination here, and instead characterize their decision as "revers[ing] the judge's *legal* conclusion" (italics in original). But, even if they are correct, my colleagues still err. The judge found that Bandy "gradually swung his right hand diagonally across his neck with the thumb pointing up." By reversing the judge's conclusion that this gesture could reasonably be construed as threaten-

Finally, my colleagues contend that the Respondent has not applied its zero-tolerance policy consistently and therefore assert the Respondent has not shown it would have discharged Bandy in the absence of his protected activity. I disagree with their starting premise that the General Counsel has satisfied his initial burden by inferences drawn from the aforementioned evidence of a no-repeat-strike pledge and timing, thereby shifting to the Respondent the burden to establish its rebuttal defense. On the contrary, the judge correctly reviewed the evidence of the alleged inconsistencies in the Respondent's application of its zero-tolerance policy as one last alternative basis for inferring discriminatory motivation in support of the General Counsel's initial *Wright Line* burden. This judge found the evidence insufficient to meet that burden, and so do I.

The evidence of discipline, or lack of discipline, for conduct arguably subject to the zero-tolerance policy is limited to two prestrike incidents and three poststrike incidents. At most, this evidence demonstrates arguable inconsistency in application of the policy, but falls far short of proving disparate treatment of Bandy for participating in the strike or because he made his threatening gesture to a nonstriker. Both before and after the strike, the Respondent has enforced its policy by discharging employees for violations. Of the two employees discharged for violating the policy poststrike for making what the Respondent viewed as serious physical threats, Bandy was a former striker but Roosevelt Smith was not.

In order to find disparate treatment from this evidence, my colleagues implicitly rely on their own sanitized, discredited version of Bandy's gesture and make their own assessment that discharge for this redefined conduct was improperly severe because lesser or no penalties were assessed against employees in two instances which they judge to be as or more egregious. This analysis, of course, is not the Board's legitimate role.

It is well recognized that "[t]he Board does not have authority to regulate all behavior in the workplace and it cannot function as a ubiquitous 'personnel manager,' supplanting its judgment . . . for those of an employer." *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1105 (D.C.Cir. 2001). *Detroit Paneling Systems,* 330 NLRB 1170, 1171 fn. 6 (2000) (Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline"). "In short, an employer has the right to discharge an employee for any reason, whether it is just or not, and whether it is reasonable or not, as long as the discharge is not, in part, in retaliation for union activities or support. The question of proper discipline of an employee is a matter left to the discretion of the employer." *Tama Meat Packing Corp.*, 230 NLRB 116, 126 (1977). "The Board is limited to determining whether there was a discriminative motive behind an employee's discharge and not whether the Board agrees with an employer's reasons or even finds them reasonable." Id. See also *Borin Packaging Co.,* 208 NLRB 280, 281 (1974) ("[absent] a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all. *Whether other persons would consider the reasons assigned for a discharge to be justified or fair is not the test of legality under Section 8(a)(3)*.") (emphasis added); *Neptco, Inc.*, 346 NLRB 18, 19 (2005) (same); *Great Plains Beef Co.,* 241 NLRB 948, 964 (1979) ("mere fact an employer may act unreasonably does not prove it acted discriminatorily").

In sum, I find my colleagues have relied on scant evidence and unsupported inferences to find that the General Counsel has met the initial *Wright Line* burden of proving unlawful motivation for Bandy's discharge. They compound their analytical error by impermissibly substituting their own view of what conduct warrants discipline under the Respondent's established zero-tolerance policy. Unlike them, I would find that the General Counsel has failed to meet his initial *Wright Line* burden. I would affirm the judge's finding that the Respondent lawfully discharged Bandy for making a threatening gesture to another employee in violation of the Respondent's zero-tolerance policy, and I would adopt the judge's recommendation to dismiss the complaint.

Dated, Washington, D.C. August 18, 2014

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

ing, my colleagues unfortunately and improperly substitute their business judgment for the Respondent's.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters Local Union No. 371 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Bruce Bandy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Bruce Bandy whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Bruce Bandy for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Bruce Bandy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

NICHOLS ALUMINUM, LLC

The Board's decision can be found at www.nlrb.gov/case/25-CA-082690 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Ahavaha Pyrtel, Esq., for the General Counsel.
Michael A. Snapper and *Keith J. Brodie, Esqs. (Barnes & Thornburg LLP)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Peoria, Illinois, on January 24, 2013. Teamsters Local Union No. 371 (the Union) filed the charge on June 8, 2012, and the General Counsel issued the complaint on October 25, 2012.[1] The complaint alleges that Nicholas Aluminum, LLC (the Company) violated Section 8(a)(3) of the National Labor Relations Act (the Act) by discharging Bruce Bandy on April 27 because he engaged in union activity in support of Teamsters Local Union No. 371 (the Union). The Company denies the allegations and asserts that Bruce Bandy was discharged because he threatened another employee with serious physical injury in violation of company rules.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a limited liability company, has been engaged in the manufacture and sale of aluminum at its facilities in Davenport, Iowa, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Iowa. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] Unless otherwise stated, all dates refer to 2012.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The company has two plants—the casting plant (NAC) and the finishing plant (NAD). Between the two facilities, the Company processes convert scrap metal into aluminum sheets for use by the building industry. The plant manager at NAC at the relevant times was Bill Hebert. The plant manager at NAD at the relevant times was Celal Tekell.

There are approximately 165 employees in the casting plant working in about 24 different job classifications and 9 departments: receiving, shredding, blending, melding, hot mill, caster, maintenance, shipping, and rotary barrel furnace.

Bruce Bandy was employed by the Company since February 2, 1978, and was a longtime member of the Union. For the past 15 to 20 years, he has worked as a blending operator. His duties include adjusting the chemistry and maintaining control of the alloys in the melders and holders. Bandy worked a 12-hour shift. His immediate supervisor was Blending Supervisor Vick Hansen, who reported to (now former) Plant Manager Hebert.

B. Organizing Campaign

The Union represented the bargaining unit employees at the Company's Davenport facilities at all relevant times. The collective-bargaining agreement (CBA) between the parties expired in November 2011. During the negotiation of a successor agreement between the Company and the Union, the latter initiated a strike at the Davenport facilities which lasted from about January 20 through April 6. Bandy was one of the employees who participated in the strike.[2]

While the strike was in effect, the Company hired replacement workers to perform the work, approximately 100 of whom it eventually hired on a permanent basis on April 4. The Union ended the strike on April 6 and the Company called the striking employees, including Bandy, back to work.

As striking workers returned to work, the Company held orientation meetings at both NAC and NAD. Participants in these meetings on behalf of the Company included Human Resources Manager Kristy Riley (now former) Vice President of Human Resources Mike Albee, and Hebert. During the meetings, the Company told the employees that they could not return to work unless they promised to not strike again. Bandy was one of the employees who signed such a pledge.[3] Thereafter, the Union intervened and prevented the Company from getting additional written pledges, but the Company received verbal assurances from the employees that they would not engage in a strike again. Employees were also reminded of the Company's no-tolerance policy on harassment, intimidation and physical threats.[4]

C. "No Tolerance Policy" and Its Past Enforcement

1. Content of the policy

The Company has policies against violence and harassment in the workplace.[5] The agreement between the Company and the Union provides that the commission of certain violations by employees—listed under "Group 1" violations—may lead to discharge without a notice. One of these violations is "Assault on any employee: Violation of the Company's policy on Workplace Violence and Threats."[6]

2. Incident involving Craig Saltzburger

On or around May 4, Robert Schalk, a returning company employee who participated in the 2012 strike, was waiting in line to punch out and speaking with fellow employee Darren Schnowski. At this time, replacement worker Craig Saltzburger, without any apparent provocation began screaming at Schalk, "What the fuck are you looking at? You got a fucking problem?" while grabbing himself on the crotch. Schalk ignored Saltzburger and walked out, but Saltzburger followed Schalk outside, stepping in front him and asking Schalk if he thought Saltzburger was "pretty" and what his "fucking problem" was. Schalk asked Saltzburger to get away from him and attempted to get to his car, but Saltzburger stepped in front of Schalk again and asked, "You got a fucking problem? What are you looking at?" At this point, Schalk told Saltzburger that they should go upstairs and report the confrontation. Saltzburger seemed to agree: "That would be fucking fine, let's fucking do it."

As they returned to the facility, Schalk saw Supervisor Phil McBroom and called him over. Schalk described what happened, while Saltzburger continued hurling invectives: "You got a fucking problem? What are you looking at?" In response to Schalk's report, McBroom asked Schalk, "What the fuck do you want me to do about it?" Schalk told him that he thought he was supposed to report such apparent violations of the no-tolerance policy. McBroom told Schalk that he "should fucking grow up," and that if Schalk wanted him to do anything, he would fire both employees. Schalk left.

Later, Shalk called and left a message for Riley, the human resources manager. In the message, Schalk detailed

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[2] Aside from the fact that Bandy went on strike, there was no evidence that he was engaged in any unusual, strategic, or significant role during the walkout period. (Tr. 26, 35.)

[3] GC Exh. 3.

[4] Although the assurances were not given in writing, the Union does not contest the applicability of the Company's policy as contained in the expired CBA. (Tr. 82–84, 100–102; R. Exh. 3.)

[5] The Company offered substantive details as to its policy regarding violence in the workplace. One of the slides shown during the poststrike orientation meetings in 2012 related to "safety" and provided assurances that it was continually taking steps to reduce the negative effects of "injuries." (R. Exh. 3.) The slide generally states that employees "follow all safety requirements," although no information was offered as to the substantive content of those requirements, and the words "violence" or "threats" were not mentioned. Another slide titled "Company Violence in the Workplace Statement" informed employees that "[h]arassing disruptive, threatening, and/or violent situations or behavior by anyone, regardless of status, will not be tolerated and subject to discharge for the first offense." (R. Exh. 3.) A notice stating the same was placed on the Company's bulletin sometime after the strike. (R. Exh. 4; Tr. 172–173.) Another document defined "Prohibited Conduct" to include, among other things, "[p]ossession of firearm, knife with a blade greater than three inches or any weapon while on Company property or while on company business" and "[a]ggressive or hostile behavior that creates a reasonable fear of injury to another person. . . ."

[6] R. Exh. 5.

Saltzburger's harassing behavior and McBroom's inaction. The call was not returned and, later that afternoon, Schalk called Hebert and left a message. Hebert returned the call a short while later, promised that the Company would look into it and launch an investigation. A few days later, Schalk met with Riley and Mike Belk, a union steward. At the end of the meeting, Riley told Schalk "that when there is more than one employee involved, you never get the full story." She did, however, promise Schalk that she would look into the matter. Schalk never heard back.[7]

In August, Schalk emailed Plant Manager Brian Wolfe asserting that, by threatening to discharge Schalk for reporting the Saltzburger incident, McBroom engaged in threatening, harassing, and intimidating behavior in violation of the Company's zero-tolerance policy. Schalk previously expressed this concern to Wolfe. Wolfe took no action.[8]

3. Incident involving John Dinkman and Sam Harroun

Christopher James was a caster assistant at NAC since August 2007 who participated in the 2012 strike as a picket line patrol. On October 12, within a week of returning, he attended a staff meeting. Others present included Supervisor Everett Orey, melding operator Sam Harroun, and caster assistants John Dinkman and Aaron Ellenberg. Harroun, Dinkman, and Ellenberg were all replacement workers. During the meeting, Harroun said to Dinkman that it was the caster assistants' fault that the "holder" was too hot. Dinkman disagreed and said he never told the caster assistants to watch the temperature. Orey told the employees to stop blaming each other. Harroun then turned to Dinkman and said, "I'm going to take you out back and beat your ass." After exchanging additional comments, Orey concluded by saying, "Hey, that's enough." No disciplinary action was taken in response to Harroun's comment.[9]

4. Incident involving Mike McGlothen

On December 20, 2011, electrician Mike Cook reported seeing NAD mechanic Mike McGlothen cleaning and loading a pistol in an office at NAD. This made Cook uncomfortable, prompting him to report the incident to Mike Albee. After investigation of the incident, McGlothen was terminated on January 13 for violating the Company's rule: "Assault on any employee. Violation of the Company's policy on Workplace Violence and Threats." However, the Company rehired him during the strike the following month.[10]

5. Incident involving Roosevelt Smith

During the summer of 2012, former employee Roosevelt Smith told his supervisor, Jim Hays, that he had weapons in his car and was going to shoot him "in the gut," causing Hays to "shit in a bag for the rest of his life." The Company suspended Smith for 2 weeks before discharging him.[11]

6. Incident involving Ed Fountain

One to 2 years prior to the 2012 strike, Ed Fountain, a maintenance employee, called Riley and threatened to go to her office and beat her with a baseball bat. He was fired sometime after this incident.[12]

D. Events of April 25, 2012

Keith Braafhart has been employed by the Company since 1995. He primarily worked at NAD, but also worked at NAC as needed. During the 2012 strike, Braafhart was one of the employees who crossed the picket line. Since that time, he has worked as a melding utility employee at NAC.

On April 25, Braafhart was operating a forklift truck and moving toward melder 3. As he approached one of the intersections, Bandy walked out of the melding back room, coming to the right side of Braafhart. Braafhart honked a few times and slowed down. At that time, Bandy looked toward Braafhart and gradually swung his right hand diagonally across his neck with the thumb pointing up. Braafhart construed Bandy's gesture as a threat.[13] Braafhart saw Sam Harroun and asked him if the latter witnessed the incident. Harroun stated that he saw the gesture as a request to Braafhart to stop blowing the horn.[14]

Braafhart parked the truck and went to report the incident to the human resources department. He later met with Albee, Hansen and Hebert as they took notes, and asked Braafhart not to speak with anyone about the incident after leaving. Management also interviewed Harroun later that day. He described Bandy's hand gesture and opined that it resembled a gesture where one person tells another to shut off the vehicle's engine.[15]

Shortly thereafter, Bandy was called to the office and suspended. On April 27, Riley called Bandy to inform him that he was discharged.

Legal Analysis

The General Counsel contends that the Company violated Section 8(a)(3) by discharging Bruce Bandy on April 27 be-

[7] These findings are based on Schalk's credible and unrefuted testimony. (Tr. 84–88.)

[8] GC Exh. 14.

[9] These findings are based on James' credible testimony. (Tr. 103–110.)

[10] Aside from Cook's reaction, there is no evidence that McGlothen was attempting to harass, intimidate, or injure anyone. (GC Exh. 4; Tr. 30, 186–187.)

[11] This finding is based on Hebert's credible testimony. (Tr. 162–163.)

[12] This finding is based on Riley's credible testimony. (Tr. 158, 164.)

[13] I credit Braafhart's testimony that he did not reasonably construe Bandy's gesture as a request to cut off the machine, but rather, as a cut throat gesture. His reenactment revealed a gradual, and not rapid, movement of Bandy's arm, thus ruling out involuntary movement. (Tr. 129, 134–136.) Bandy's explanation and reenactment, on the other hand, were inconsistent and incredible. He described numerous near accidents involving moving equipment and how he tends to respond by lurching backwards and involuntarily moving his right hand in a diagonal motion across his chest. Instead, when confronted about the gesture by Braafhart, he told him he was scratching his throat. (Tr. 48–56, 71–74.)

[14] Contrary to his comments to Braafhart that Bandy was signaling to stop blaring the horn, Harroun testified that Bandy walked by chuckling and said that his throat itched. (Tr. 139–140; R. Exh. 1.)

[15] This finding is based on Harroun's credible testimony. (Tr. 140, 144–146; R. Exh. 2.)

cause he supported the Union by going out on strike the following year. The Company denies the allegations and asserts that Bandy was discharged because he threatened another employee with serious physical injury in violation of its no-tolerance for violence or harassment policy.

The 8(a)(3) allegations are analyzed under the *Wright Line* framework, which requires the General Counsel to make a prima facie showing of sufficient proof to support the inference that protected conduct was a motivating factor in the employer's decision, 251 NLRB 1083, 1089 (1980). To meet this burden, the General Counsel must establish that the employee engaged in protected activity, and that the employer had knowledge of the protected activity, and took adverse action against the employee as a result of this protected activity. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Once the General Counsel has proven these elements, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct. *Manno Electric, Inc.*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discharge are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

It is undisputed that the Company knew that Bandy, a bargaining unit member, engaged in protected concerted activity by participating in a union-sponsored strike in 2012. I also found that, after returning to work, he made a threatening gesture to an employee who did not go out on strike. Whether Bandy's discharge after returning from the strike was due to his protected activity, however, is heavily disputed. The General Counsel contends that his strike participation alone provides sufficient circumstantial proof upon which to predicate animus, while the Company argues that Bandy was one of many who went on strike and returned to work, almost all without incident.

Simply participating in a union-sponsored strike along with many others and being discharged for misconduct at some point after returning to work is not enough to demonstrate antiunion animus. More evidence is required, whether in the form of independent 8(a)(1) violations, hostile remarks, or actions by supervisors regarding protected concerted activities, or disparate treatment in the enforcement of an employer's rules. See *Airo Die Casting, Inc.,* 354 NLRB 92, 131 (2009) (no evidence of antiunion animus simply because employer delayed reinstating two former strikers, where the decision was based on seniority, they were part of a group of 300 strikers, were not particularly active or outspoken union supporters or engaged in any other protected activities that would cause employer to single them out from among the returning strikers for discriminatory treatment); *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302 (D.C. Cir. 2006) (discharging former striker for insubordination, without more, did not establish antiunion animus); *Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1234 (5th Cir. 1976) (union membership cannot protect clear insubordination where employer's discipline was not motivated by antiunion animus). Cf. *NLRB v. Transporation Management Corp.*, 462 U.S. 393 (1983) (employer displayed antiunion animus when it discharged employee who attempted to establish a union for work infractions because the employer had not followed its customary practice of issuing written warnings before discharge); *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995) (animus where employer considered striking employees' participation in a strike as a factor in making its decisions to hire after the strike and treated nonstriking applicants preferentially); *Outboard Marine Corp.-Calhoun*, 307 NLRB 1333, 1368–1369 (1992) (employer unlawfully retaliated against strikers by delaying their recall, denying promotional opportunities, misclassifying their positions, subjecting them to more onerous working conditions, and applying other disparate treatment).

Here, there is no background of independent 8(a)(1) violations during the period after the strike and up to the time of Bandy's discharge. Nor is there any evidence of hostile remarks or actions by the employer since the strike concluded and employees returned to work. We do have an evidentiary sampling, however, of other employee-on-employee confrontations within the Company's workplace revealing instances in which it either did or did not enforce its policy against violence and harassment.

When the charging party attempts to show antiunion animus by alleging that the employer discharged an employee based on an action which the employer treated more leniently in the past, the employer can rebut the claim by presenting evidence that it treated similar behavior in a similar manner. See *NLRB v. Hospital San Pablo, Inc.*, 207 F.3d 67, 73 (1st Cir. 2000) (employer displayed antiunion animus by discharging an employee, who engaged in union activities, based on an infraction that a nonunion employee also committed in the past without enduring similar punishment).

The record presents a mixed bag of company responses to employee-on-employee confrontations within the relatively recent past. The Company previously discharged three employees for violating its no-tolerance policy. Two employees, Fountain and Smith, explicitly threatened to cause serious physical injury to coworkers via shooting with a gun or beating with a baseball bat. Another employee, McGlothen, brought a gun to work and, although there is no evidence that he cleaned and loaded it in an open work setting, was discharged in accordance with the no-tolerance policy. The section cited—assault—was a plausible conclusion based on a fear that the incident created. McGlothen was rehired a month later as the Company brought in replacement workers during the strike. However, that subsequent development was driven by the Company's desire to hire replacement workers and, without more, does not undermine the legitimacy of the Company's earlier discharge.

On the other hand, the Company took no disciplinary action against two employees who engaged in other conduct tantamount to threats of violence or harassment. In one instance, Harroun told another employee that, essentially, he was going to beat him up. The statement was made in front of a supervisor, who resolved the matter at that time.

In another instance, Saltzburger, a replacement worker, harassed Shalk, a coworker who had gone out on strike. The circumstances leading up to the confrontation are slim, but some-

thing obviously transpired, leading Saltzburger to harass Shalk numerous times on 1 day. The harassment consisted of an invective-laced inquiry as to what problem Shalk had with him. The two of them then went to a supervisor, where Saltzburger continued his barrage. The supervisor did nothing, except warn Shalk to grow up. Similarly, human resources officials also did nothing after the matter was reported to them.

This situation presents a close call. The record contains two discharges based on threats to cause serious injury or worse, and one discharge, labeled an assault, for cleaning and loading a gun at work. In two instances, the Company did not discipline employees who harassed or threatened coworkers. The harassment situation did not suggest that it would be followed by violence, while the threat as to kicking a coworker's rear end referred, at most, to a physical injury. In Bandy's case, he made a gesture by simulating the cutting of his throat that the Company reasonably construed as a threat of serious physical injury or death.

When considered together, the record evidence indicates a tendency by the Company to enforce the no-tolerance policy against employees who threaten or harass others with serious physical injury or worse, while threats of physical injury and harassment tend to be overlooked. Under the circumstances, these previous instances do not establish by the preponderance of the evidence that the Company engaged in the disparate treatment of Bandy by discharging him for threatening another employee with serious physical injury or worse.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company has not violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington D.C. April 8, 2013

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.